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Taking the ‘Pulpit’ Out of the ‘Bully Pulpit’: The Establishment Clause and Presidential Appeals to Divine Authority

Rachael F. Goldfarb*

“I declare, we forgot it!”

—Alexander Hamilton, reportedly in response to a Princeton professor who, after the Constitutional Convention, told Hamilton that several faculty were disheartened to learn that the Constitution does not recognize God or the Christian religion.¹

I. Introduction

A historian, studying the influences of the evangelist Jonathan Edwards, was recently quoted as saying, “Not to understand religion . . . in American history is like trying to make sense of *Moby Dick* without the whale.”² The religion clauses in the First Amendment sought to, in part, preclude an established religion of the federal government.³ Nevertheless, American history is replete with religious influences and religion continues to serve as an important arbiter of behavior. Although

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1. See A. JAMES REICHLEY, *FAITH IN POLITICS* 103 (2002).

2. *Understanding American Evangelicals: A Conversation with Mark Noll and Jay Tolson*, CENTER CONVERSATIONS, (ETHICS & POL’Y CENTER, Washington, D.C.), June 2004, at 7, available at http://www.eppc.org/docLib/20040602_cc%2329v8.pdf (last visited July 3, 2005).

3. See THOMAS CURRY, *THE FIRST FREEDOMS* 216 (1986).

religion has not infiltrated every facet of cultural life in America,⁴ it maintains a significant presence, as evidenced by the overwhelming popularity of Mel Gibson's biopic *The Passion of the Christ*,⁵ and the persistence of religious-laden tomes like *The DaVinci Code* on the *New York Times*' Bestsellers' List.⁶

The influence of religion in certain aspects of American life would both surprise and dismay some of the country's founders;⁷ in particular, it has emerged as a potent force in American politics.⁸ Recently, evangelicals were credited with providing President George W. Bush with a second term⁹ and some polls have suggested that "moral values" served as a guiding force for many Americans when they entered the voting booths.¹⁰ Many political analysts—on both ends of the political spectrum—have suggested that a driving force for religious voters was the religious rhetoric President Bush used both as a presidential candidate and throughout his first-term.¹¹ While President Bush is hardly the first president to invoke God, (in fact, George Washington initiated the tradition of concluding the inaugural swearing-in with, "So help me God")¹² Bush often couches his *policy* decisions in religious language¹³ in an effort to galvanize a particular religious constituency, a group upon which his re-election depended.¹⁴ This practice is not entirely novel;

4. See Bill Carter, *Many Who Voted for 'Values' Still Like Their Television Sin*, N.Y. TIMES, Nov. 22, 2004, at A1.

5. See Bruce Nash, *The Numbers*, at <http://www.the-numbers.com/movies/2004/PASON.php> (last visited July 3, 2005). As of July 3, 2005, *The Passion of the Christ* has generated nearly \$610 million in worldwide gross box office receipts.

6. See *New York Times*' Bestsellers' List, N.Y. TIMES, July 10, 2005 available at <http://www.nytimes.com/pages/books/bestseller/index.html> (last visited July 3, 2005). As of July 3, 2005, Dan Brown's *The DaVinci Code* is in its 119th week on the *New York Times*' "Bestsellers' List" in the Hardback Fiction category.

7. See REICHLEY, *supra* note 1, at 105.

8. See generally RICHARD G. HUTCHESON, JR., *GOD IN THE WHITE HOUSE* (1988).

9. See Alan Cooperman and Thomas B. Edsall, *Evangelicals Say They Led Charge for the GOP*, WASH. POST, Nov. 8, 2004, at A01 ("According to surveys of voters leaving the polls, Bush won seventy-nine percent of the 26.5 million evangelical votes and fifty-two percent of the thirty-one million Catholic votes. Turnout soared in conservative areas such as Ohio's Warren County, where Bush picked up 18,000 more votes than in 2000.").

10. See Katharine Q. Seelye, *Moral Values Cited as a Defining Issue of the Election*, N.Y. TIMES, Nov. 4, 2004, at A4.

11. *Id.*

12. HUTCHESON, *supra* note 8, at 37.

13. Laurie Goodstein, *A President Puts His Faith in Providence*, N.Y. TIMES, Feb. 9, 2003, § 4 (Wk. in Rev.) at 4.

14. Karl Rove has often speculated that the 2000 election was such a close one because approximately four million evangelicals were discouraged from going to the polls after it was disclosed, five days prior to the election, that George W. Bush had been convicted of drunk driving in 1976. See Linda Feldmann, *A Month of Mini 'October Surprises'*, CHRISTIAN SCI. MONITOR, Oct. 29, 2004, at 1.

President Jimmy Carter was the first president to declare himself a "born-again Christian,"¹⁵ and several presidents throughout American history relied on divine authority to sway public opinion.¹⁶ Nevertheless, President Bush has used religion in a way distinct from those presidents who came before him. Even the most seemingly neutral rhetoric expressed during the Bush presidency can serve as speech steeped in a religious code that only evangelists can fully appreciate.¹⁷

The nature of President Bush's rhetoric is subtly laced with religious references and it suggests that his religious ideology serves to justify policy choices. This comment argues that a president's public speech—where he articulates particular policies—while using religious imagery and ideas is an endorsement of religion¹⁸ and should be considered a violation of the First Amendment of the U.S. Constitution. This comment will analogize the dual treatment between public and private speech that exists in defamation law for members of Congress and argue that when the president speaks in an official capacity as the head of the state, his speech should be treated in a different manner from those instances when he is expressing his private or personal views. This comment will further argue that religious-laden speech made by the president in his official capacity runs contrary to the intentions of the founding fathers.

This comment does not espouse the view that a society should be entirely secular; in fact, recent developments in France¹⁹ suggest that such an effort would oppose the aims set forth in the Bill of Rights. The First Amendment reflects a desire to inculcate a national moral sensibility by promoting religion through cultural and social forces, not political ones.²⁰ Specifically, the founders collectively recognized that religion served as an important organizing force and they sought to

15. Goodstein, *supra* note 13.

16. *Id.*

17. See Elisabeth Bumiller, *White House Letter: The Man Who Puts Words in the President's Mouth Defends His Style*, N.Y. TIMES, Jan. 17, 2005, at A15:

Mr. Bush has often talked about [a generational] struggle in the context of religion, and has included religious rhetoric in the major speeches of his first term. The language has angered many of Mr. Bush's critics and unsettled some religious leaders, who say that Mr. Bush sounds more like a preacher than the president of a secular nation.

See also BOB WOODWARD, *PLAN OF ATTACK* 86 (2004) ("Gerson, who like Bush is a self-described evangelical Christian and 'compassionate conservative,' admired the way that Bush didn't shy away from injecting his religious convictions and moral conclusions into speeches.").

18. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

19. See generally Christopher Caldwell, *The Decline of France*, WKLY. STANDARD, Dec. 8, 2003.

20. See generally CURRY, *supra* note 3.

encourage individual religious practice,²¹ but they simultaneously recognized the dangers present in a national government that could easily become enmeshed in religious matters.

The President of the United States serves a peculiar and particular role in American society, and his speech carries with it the authority and endorsement of the state. Ultimately, presidents need to be more cautious in their policy speeches, they need to surround themselves with advisors who are sensitive to religious plurality, and the public should decline to support policies where the president has used religion to justify them.

II. The Construction and Passage of the Religion Clauses in the First Amendment

Historically, religion has served as an arbiter of an absolute truth that the state, through its institutions and leaders, has been expected to enforce.²² The conflation of religion and politics emerged from a tradition that began when Christianity was recognized as the official religion of the Roman Empire in A.D. 383.²³ Christians sought to impose their religious views where political resources were available under the theory that a responsible state had an obligation to protect its citizens from eternal damnation.²⁴ Over the course of several centuries, the hope of Christians to integrate religious and political activities was achieved through largely practical concerns.²⁵ The Peace of Augsburg of 1555, for example, served to formalize the principle that the religion of the prince determines the religion of his people.²⁶

This trend, however, was met with skepticism when the founding fathers began to contemplate drafting the Constitution.²⁷ Ironically, the Christian notion of “original sin” led the founders, in part, to have a deep distrust of both those who were being governed and those who were

21. See DAVID MCCULLOUGH, *JOHN ADAMS* 222 (2001). John Adams was charged with drafting the Constitution for the Commonwealth of Massachusetts in 1779:

While it did not guarantee freedom of religion, it affirmed the “duty” of all people to worship “The Supreme Being, the great creator and preserver of the universe,” and that no one was to be “hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner most agreeable to the dictates of his own conscience,” provided he did not disturb the public peace.

Id.

22. See REICHLEY, *supra* note 1, at 63.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 64.

27. *Id.* at 103.

governing the people.²⁸ Nevertheless, the explicit reference of religion in the First Amendment belies the importance its drafters placed on its inclusion.²⁹ While the founders concluded that the national government should be largely secular and aggressively sought to prevent federal intervention in religious issues, the passage of the First Amendment was largely a symbolic act and its construction was based less on substance than style.³⁰

A. Drafting and Passing the Religion Clauses

On May 4, 1789, Madison announced in the House of Representatives his intention to introduce amendments to the Constitution.³¹ This accomplishment was worthy of note because the House had initially opposed such a maneuver; it was reluctant to devote time to what many House members believed were needless amendments.³² In fact, when the Bill of Rights was presented before Congress, more time was devoted to debating its necessity as a whole and determining whether it should exist as an extension of the Constitution or serve as an entirely separate document;³³ little time was devoted to debating the substance of the individual freedoms at issue.³⁴ Congress hastily passed the amendments, but there is sufficient documentation to provide a limited understanding of what the founders intended when they drafted the religion clauses.³⁵

On August 24, 1789 the House forwarded the following language in the First Amendment for ratification by the Senate: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."³⁶ The report from the Senate reveals that various Senators sought to strike out the "nor shall the rights of conscience be infringed" language and alter the House language so it would read, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."³⁷

Because the Senate met in a secret session to discuss the

28. See REICHLEY, *supra* note 1, at 103.

29. *Id.*

30. See generally CURRY, *supra* note 3.

31. *Id.* See also 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1057 (1971).

32. See CURRY, *supra* note 3, at 199.

33. *Id.*

34. *Id.*

35. *Id.*

36. See JOSEPH GALES, *THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES* 796 (1834).

37. *Id.*

amendments, there is no written record of their discussions.³⁸ However, the report that emanated from the debates reveals that there was a clash between those who believed in a broad prohibition of government interference in religious activities and those who subscribed to delineating a narrower prohibition that would allow for non-discriminatory assistance to all religions and only prevent the government from favoring one sect over another.³⁹

Thomas Curry argues in his book, *The First Freedoms*, that prior to the formulation of the First Amendment, Congressional members did not clash in a debate about the extent to which government could incorporate religion into its practices, but rather, they discussed how to adequately articulate what was widely agreed upon—the federal government would have no authority in religious matters.⁴⁰ It was not until after House and Senate members formed a joint conference that Congress arrived at the language which would become the religion clauses of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”⁴¹

B. The Significance of the Language of the Religion Clauses

The founders subscribed to the theory that the national government should be secular because of the overwhelming religious pluralism that pervaded the colonies at the time. The concern that established churches throughout history had produced, according to Madison, “superstition, bigotry, and persecution,” along with the traditions set forth by John Locke and Roger Williams, led the founders to believe that coerced religion impeded a person’s genuine faith.⁴²

The juxtaposition of the Establishment and Free Exercise Clauses has often been interpreted by both scholars and courts as a way in which the drafters sought to balance competing forces. However, given the nature of the debates at the time the First Amendment was codified, along with the speed in which the amendment was passed, there is sufficient evidence to support the notion that such an analysis overburdens the meaning and construction of the amendment.⁴³

The passage of the First Amendment was a symbolic act designed to reassure the states that the religious liberty they enjoyed after winning

38. See CURRY, *supra* note 3, at 207.

39. *Id.*

40. *Id.* at 215.

41. *Id.* at 207.

42. See REICHLEY, *supra* note 1, at 105.

43. See CURRY, *supra* note 3, at 216. See also MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1956).

the Revolutionary War would not be compromised.⁴⁴ The amendment was designed to communicate the non-existence of power, not the regulation or limitation of an affirmative power accorded to the federal government.⁴⁵ The two clauses, in fact, merely serve as an articulation of what Americans believed were principles that had been well established regarding church-state relations; specifically, that federal interference was not a violation of the sort of establishment that was expressed in the First Amendment, but rather, was a violation of the states' ability to encourage the free exercise of religious activity.⁴⁶

There was little need for the religion clauses; they simply served as a formal enunciation of the powerlessness of the federal government in matters of religion because the state governments *did* interfere in religion.⁴⁷ The construction of the clauses was rooted in the idea that the federal government had no authority to interfere with matters concerning the religious activity of its citizens.⁴⁸

III. Comparing America's Relationship to Religion with Relationships that Exist Abroad

In order to understand how complicated and potentially problematic religion can be in political and cultural spheres, it is instructive to examine the ways in which political leaders abroad have grappled with these issues. Furthermore, it is useful to catalogue the speech of the early presidents in an effort to determine how they melded religion with politics and to understand both the ways in which they intended religion to influence the cultural and political arenas in American life, and how that vision deviates from the current formulation of religion in the public sphere both at home and abroad.

A. *France's Attempt to Impose Secularism: *Lacit **

A recent controversy in France demonstrates how prescient the founding fathers were and how sophisticated their understanding was of the ways in which religion could undermine the political arena. Ultimately, the founders understood what France has failed to understand—the national government cannot successfully impose a secular view upon the people.

In France, there has been a long and troubling history of conflicts that have erupted between the state and various religious factions;

44. See CURRY, *supra* note 3, at 216.

45. *Id.*

46. *Id.* at 217.

47. *Id.*

48. See generally *id.*

Protestants were purged from the Republic following the massacre of St. Barthelemy in 1572, Catholics were persecuted following the French Revolution, and Jews were expelled throughout the Middle Ages and shipped to concentration camps during World War II.⁴⁹ As a result of these bloody entanglements with religious institutions, the state has, in its recent history, embraced a secular agenda.

In 1905, France instituted a formal separation of church and state under the Third Republic.⁵⁰ This sharp separation is known as *laïcité* or “secularism” and it translates to encapsulate a history rather than articulate a particular theory or approach to governing.⁵¹ In essence, *laïcité* is viewed by the French as an essential compromise whereby religion is relegated entirely to the private sphere and has no place in public life whatsoever.⁵²

Amidst the emergence of the doctrine of *laïcité*, the Catholic Church maneuvered to maintain their public financing for the vast network of its schools throughout the country.⁵³ This compromise, and the entanglements that exist between religion and the state throughout the school system, have led to the bitter debate that is currently raging throughout France over a law that would forbid women to wear Muslim headscarves to school.⁵⁴ Initially, President Jacques Chirac appointed a commission, led by the centrist politician Bernard Stasi, which recommended a ban on “conspicuous” religious symbols in schools and other public buildings.⁵⁵ While the commission recommended a ban on the Jewish yarmulke as well as the Christian cross, the focus in France has been almost entirely on the implications of banning the Muslim headscarf.⁵⁶

The notion of *laïcité* seeks to further government separation and promote neutrality, but the banning of Muslim headscarves from schools is viewed as a political strategy⁵⁷ that, according to the French Council

49. See Charles M. Sennott, *Many Uneasy as Paris Eyes Scarf Ban*, BOSTON GLOBE, Jan. 17, 2004, at A6.

50. *Id.*

51. See Christopher Caldwell, *Can French Secularism Survive Islam?*, WKLY. STANDARD, Jan. 19, 2004, at 9.

52. *Id.*

53. See Eric Teo Cheo, *France's Law on Headscarves Has Global Impact*, STRAITS TIMES (Sing.), Feb. 21, 2004.

54. Caldwell, *supra* note 51.

55. *Id.*

56. See Keith B. Richburg, *French Senate Approves Ban on Religious Attire*, WASH. POST, Mar. 4, 2004, at A14.

57. See Cheo, *supra* note 53:

Interestingly, the present law is being actively pushed by Mr. Chirac and the majority Right, with massive socialist support. On the national political chessboard, this law appears to have a political mission to “cut the grass under the feet” of the populist extreme-right National Front [party], which had given

on the Muslim Religion, is "aimed at Muslims, stigmatizes their religion, practices exclusion, and condemns them to turning inward to their own community."⁵⁸ Mr. Chirac not only finds himself amidst a public relations debacle (immediately prior to Christmas in 2004, 3,000 veiled women took to the streets of Paris demanding the right to wear their religious garb to school),⁵⁹ but he may also have to make a nearly impossible choice between selectively banning the public expression of religion and maintaining the health of France's social compact.⁶⁰

Ultimately, the rigid secularism that exists in France, and the problems that have emerged because of it, could never flourish in the United States both because the American population boasts a unique religious plurality and because the founding fathers never intended to support an American society where religion was entirely absent.

B. The President as National Priest

The architects of the Bill of Rights may not have intended for the Free Exercise and Establishment Clauses to serve as juxtaposing forces,⁶¹ but the clauses nevertheless demonstrate the delicate balance that exists between supporting a broadly designed civil religion and stifling religious expression by enforcing secularism. Historically, the American presidency has served as an institutional means to foster religious expression without endorsing or furthering a particular religious institution. America's approach to religion, whereby it is encouraged in a limited context, serves as a stabilizing force for democracy rather than as a mechanism used to effectively undermine democratic principles. However, recent attitudes held by presidents about religion deviates from the historical tradition.

Despite the strongly held belief by the drafters of the Bill of Rights that the national government should not interfere with the religious activities of its people,⁶² the executive has reaffirmed America's public faith at particular points of crisis throughout American history.⁶³ The earliest presidents of the Republic were pragmatists rather than ideologues.⁶⁴ George Washington was the first to craft the civil religion,

[Chirac] a scare at the last election when its leader . . . finished second to Mr. Chirac. . . . Mr. Chirac sees in this law a golden opportunity to reassert France's Republican credibility and sentiments, and reduce electoral support for the National Front in the next election.

58. See Caldwell, *supra* note 51.

59. *Id.*

60. *Id.*

61. See generally CURRY, *supra* note 3.

62. *Id.*

63. See generally HUTCHESON, *supra* note 8.

64. See *id.* at 36.

a national faith that both encompassed the diversity of religious views and embraced total religious freedom and mutual respect for others.⁶⁵ Thomas Jefferson and James Madison's greatest contributions to the national debate on religion were solidified prior to their respective ascensions to the presidency; they were largely responsible for establishing the original principle of the separation of church and state.⁶⁶

While Washington, Jefferson, and Madison were responsible for crafting the beginnings of the relationship between the executive and religion, it was not until Abraham Lincoln was confronted with the crisis of the Civil War that the notion of a national religion was clearly defined.⁶⁷ Although Lincoln is the only American president never to have formally joined a church,⁶⁸ he served as a symbolic religious leader because he came to articulate the nation's spiritual center in a way unlike any of his predecessors.⁶⁹ Biblical language permeated his rhetoric and because the country was deeply divided by slavery, Lincoln made great overtures to Southern Christians in the form of religious language.⁷⁰ He sought to unify the country through his expressions of religion and spirituality.⁷¹ In his second Inaugural Address, Lincoln used religion as a device to unify the country:

Each looked for an easier triumph and a result less fundamental and astounding. Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered; that of neither has been answered fully.⁷²

The speech was not considered a political opportunity to deepen the chasm that existed between the North and the South, nor was it offered to demonstrate Lincoln's own religious commitment in an effort to cull voters; rather it served as a rhetorical device to remind the nation of the ways in which it remained unified.⁷³ Lincoln successfully broadened the notion of God's sovereignty to encompass both the North and the South, and in so doing, he steered America's collective faith toward a

65. *Id.*

66. *Id.* at 38-39.

67. *Id.* at 40.

68. See CARL SANDBURG, LINCOLN'S DEVOTIONAL xiii (1957).

69. See HUTCHESON, *supra* note 8, at 40-41.

70. *Id.*

71. *Id.* at 41.

72. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.bartleby.com/124/pres32.html> (last visited July 3, 2005).

73. See HUTCHESON, *supra* note 8, at 40-41.

sustainable union.⁷⁴

With the exception of Woodrow Wilson, whose presidency reflected the peak of the national wave of evangelical Protestantism, most of the twentieth century consisted of presidents who sought to transition the country from an outdated Protestant paradigm to a tradition of Judeo-Christianity in order to reflect the religious plurality that pervaded the country.⁷⁵ President Kennedy, as the first Catholic president, reinforced the sense that a national religion had been formulated to encompass a broad swath of the populace.⁷⁶ Despite his Catholic heritage, he assuaged the initial fears of voters by assuring them that if faced with a conflict between the tenets of the Catholic Church and the laws of the Constitution, he would unflinchingly resign.⁷⁷ Upon his election, he easily assumed the role of president, and while he maintained a private commitment to his faith, it did not interfere with the public commitments he had as president.⁷⁸

Prior to the social upheaval of the 1960's, a pattern emerged with respect to presidents and their formulation of the relationship between the office they occupied and the religion to which they adhered.⁷⁹ While presidents generally engaged in the religious practices embedded in national ceremonial rituals adopted throughout history, there had been an

74. *See id.*

75. *Id.* at 43-55. President Eisenhower is credited with driving this initiative because of his military experience. In spending significant time in nondenominational Army chapels where religious life seamlessly incorporated the three faiths of Catholicism, Protestantism and Judaism, Eisenhower successfully moved the country away from a solely Protestant focus and toward a broader, more pluralistic, approach in defining a national religion.

76. *See* David D. Kirkpatrick, *Christian Conservatives Embrace Inauguration*, N.Y. TIMES, Jan. 20, 2005, at A12 ("At a ceremony when at least one conservative Democrat, Representative Howard Smith of Virginia, walked away rather than witness the swearing in of a Catholic, Mr. Kennedy set a high mark in ecumenism, including prayers by Catholic, Greek Orthodox and Jewish clergy members."). *See also* HUTCHESON, *supra* note 8, at 41.

77. *See* John F. Kennedy, Address to the Houston Ministerial Association (Sept. 12, 1960), available at <http://www.jfklibrary.org/j091260.htm> (last visited July 3, 2005):

I am not the Catholic candidate for President. I am the Democratic Party's candidate for President who happens also to be a Catholic. I do not speak for my church on public matters—and the church does not speak for me. Whatever issue may come before me as President—on birth control, divorce, censorship, gambling or any other subject—I will make my decision . . . in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates. And no power or threat of punishment could cause me to decide otherwise. But if the time should ever come—and I do not concede any conflict to be even remotely possible—when my office would require me to either violate my conscience or violate the national interest, then I would resign the office.

78. *See* HUTCHESON, *supra* note 8, at 55.

79. *Id.*

implicit understanding that their personal religious beliefs remained strictly in the private sphere, separate from their public acts as president.⁸⁰

IV. Evangelicals as a Political and Religious Force

With the advent of the counterculture in the 1960's, many Americans began to reconsider traditional religions in favor of alternative faiths.⁸¹ Buddhism became popular,⁸² Black Muslims emerged as an important force in the civil rights movement,⁸³ and a variety of other sects and cults were embraced as acceptable forms of worship.⁸⁴ Amidst the hedonism of the 1960's and 1970's, however, significant political crises, such as Vietnam and Watergate, were characterized by churches as "moral crises" and by the late 1970's and early 1980's, the country began to revert to the more familiar and traditional religious institutions that dominated after World War II.⁸⁵ The election of President Carter, however, introduced a particular strain of Christianity to the American electorate, a group that was gaining credibility within both the religious and political arenas—evangelicals.

A. *Evangelicals: Who Are They and How Do They Frame Political Speech and Expression?*

Evangelicalism, a term derived from the Greek word *evangelion* which translates to mean "the good news" or "the gospel,"⁸⁶ stands as an overarching term for a panoply of Protestant groups. There are four core beliefs to which all evangelists traditionally subscribe: first, that the born-again experience of accepting the crucified and risen Lord Jesus Christ is the Savior of all humanity; second, that in order to truly

80. *Id.*

81. See generally RANDALL BALMER, RELIGION IN TWENTIETH CENTURY AMERICA (2001).

82. See *Religion & Ethics Newsweekly: Tensions in American Buddhism* (PBS television broadcast, July 6, 2001), available at <http://www.pbs.org/wnet/religionandethics/week445/p-cover.html> (last visited July 3, 2005).

83. See *Black Power*, AMERICAN WORLD, available at http://www.pbs.org/wnet/aaworld/reference/articles/black_power.html (last visited July 3, 2005).

84. See HUTCHESON, *supra* note 8, at 60. There have been a number of critiques of this view, arguing that people did not abandon traditional religions in favor of alternative forms of worship, but rather, sought to influence and change their religious institutions by imposing the values of the counterculture on traditional modes of worship. See generally MARK OPPENHEIMER, KNOCKING ON HEAVEN'S DOOR: AMERICAN RELIGION IN THE AGE OF COUNTERCULTURE (2003).

85. See HUTCHESON, *supra* note 8, at 63-64.

86. See *Defining Evangelicals*, The Institute for the Study of American Evangelicals at Wheaton College, at http://www.wheaton.edu/isea/defining_evangelicalism.html (last visited July 3, 2005).

appreciate the life-altering fact that Christ died for their sins, evangelists must undergo a conversion experience; third, that the authority of the Bible serves as the literal word of God and fourth, that all evangelists are obligated to spread the Gospel of Jesus and convert others.⁸⁷

While these four principles have guided evangelists, their presence on the national stage has undergone several permutations, particularly in the last century. Evangelists, along with fundamentalists,⁸⁸ were marginalized during most of the early 20th century because they served as the motivating force behind Prohibition and the Sunday "Blue Laws."⁸⁹ In addition, they were collectively blamed for the infamous Scopes Trial⁹⁰ where, in 1925, a substitute biology teacher was criminally charged for illegally teaching evolution in his class.⁹¹ Evangelicals did, however, gain greater traction at the end of the 20th century because evangelical leaders designed and implemented a number of important political strategies.

After World War II, the full effect of President Roosevelt's efforts to expand federal programs was felt, and areas that were previously the domain of local governments, the individual, and the church, fell under the purview of the federal government.⁹² Nurturing the faithful began to seem less important to evangelists in light of the country's declining moral and cultural standards and the encroachment of the federal government into areas traditionally reserved for local governments and religious institutions. Thus began a trend that evangelicals found so disconcerting that they felt it demanded an immediate response.⁹³ By the 1970's, a new political sensibility emerged and evangelists re-entered the national political arena with President Jimmy Carter, the first president who was an unapologetic "born-again" Christian.⁹⁴ Ironically, the newly formed evangelical interest that existed in politics – shaped by the presence of groups like the Moral Majority—ultimately served to help

87. *Understanding American Evangelicals*, *supra* note 2. See also *Part One: Evangelicals and Identity, Religion & Ethics Newsweekly America's Evangelicals* (PBS television broadcast, Apr. 16, 2001), available at <http://www.pbs.org/wnet/religionandethics/week733/special.html> (last visited July 3, 2005).

88. Although evangelicals and fundamentalists are often grouped together, they are indeed very different religious factions. Scholars at Wheaton College, an evangelical Christian institution of higher education, have defined fundamentalism as a movement that emerged within Protestantism in the late 18th century in order to rail against modernist theology, biblical criticism, and socially deviant behavior, i.e. the consumption of alcohol and the teaching of evolution in schools. See *Defining Evangelicals*, *supra* note 86.

89. *Id.*

90. *Scopes v. Tennessee*, 152 Tenn. 424 (1925).

91. See *Defining Evangelicals*, *supra* note 86.

92. *Id.*

93. *Id.*

94. *Id.*

ouster President Carter after his first term for the less outwardly pious President Reagan.⁹⁵ Prior to the 1970's and the emergence of Carter, evangelists generally identified themselves as Democrats,⁹⁶ but the political make-up of evangelists shifted as they became increasingly concerned about abortion, prayer in school, and sex and violence in the media.⁹⁷ With changing sexual mores, dissatisfaction with the content of mass media, and a secularization of society, evangelists exhibited a renewed interest and commitment to political engagement by organizing themselves into a powerful political entity—the Religious Right.⁹⁸

The Religious Right served as a potent political force throughout much of the 1980's and 1990's, but its success in catapulting Republicans into a number of Congressional seats, as well as the White House, belies the more complex and contentious relationship evangelists have with the larger political and cultural forces at work in America. The motivations behind their political involvement are fraught with contradictions; the evangelical approach to faith is based on a personal and voluntary conversion and a solitary ideological journey, but evangelicals are also charged with a mission to generate converts, an effort that requires being acutely aware of one's surroundings and the political and cultural make-up of a particular community.⁹⁹ Evangelicalism, then, serves as a strand of Protestantism that forces adherents to conduct both a deeply personal relationship with Christ while simultaneously attempting to shape and respond to the larger community.¹⁰⁰

While evangelists have been only arguably successful in generating converts and “mak[ing] disciples of all nations,”¹⁰¹ their efforts to influence the larger community are considered more successful in the political context.¹⁰² Initially, evangelists felt compelled to insert

95. *Id.*

96. *Id.*

97. See *Part One: Evangelicals and Identity*, *supra* note 87.

98. See *Defining Evangelicals*, *supra* note 86.

99. See *Religion & Ethics Newsweekly Interview: Alan Wolfe* (PBS Broadcast, Apr. 30, 2004), available at <http://www.pbs.org/wnet/religionandethics/week735/special.html> (last visited July 3, 2005).

100. *Id.*

101. *Id.* Wolfe explains:

[S]o many evangelicals—who are, after all, supposed to be born again—were born to evangelicals. This is an interesting dilemma among evangelicals. . . . [I]t really does seem that evangelicalism is inherited and that its growth is really within the evangelical world. . . . I don't see that the explicitly proselytizing, witnessing, heavy-duty evangelicalization has much of an impact.

Id.

102. Wes Allison, *Evangelicals Sway Policy in New Era*, ST. PETERSBURG TIMES (Fla.), Oct. 11, 2004, at 1A.

themselves into the political arena because they were concerned about abortion and prayer-in-school, but they have broadened their agenda in recent years to include the secularization of society and same-sex marriage, as well as AIDS/HIV and disaster relief, refugee resettlement, human rights abuses, slavery, sexual trafficking and prison rape.¹⁰³

The National Association of Evangelicals (NAE) is an organization that was founded in 1942 to create a coordinating agency for cooperative Christian ministry and unity.¹⁰⁴ It is a group comprised largely of white Midwestern and Southern evangelicals whose political ideology is generally conservative.¹⁰⁵ In 2001, the NAE commissioned "The Evangelical Project for Public Engagement" and invited several pastors and evangelical scholars from a variety of theological traditions to participate in drafting a document that articulates the group's overall political philosophy and goals.¹⁰⁶ The document that emerged as a result of the NAE's "Project for Public Engagement" is a treatise entitled, "For the Health of the Nation: An Evangelical Call to Civic Responsibility."¹⁰⁷ The document was unanimously passed by the Board of Directors of the NAE,¹⁰⁸ and it serves to reflect the political priorities of evangelists. A drafter of the document, Ron Sider, explained that the treatise attempts to advise evangelicals on "the full range of God's concerns for the well-being of marriage, the family, the sanctity of human life, justice for the poor, [and] care for creation. . . . No longer dare one accuse evangelicals of being 'one-issue' voters focused exclusively on one or two issues."¹⁰⁹ In addition to its use as a political tool for its members, the NAE treatise serves as a mechanism in understanding the ways in which evangelists view the political landscape

103. See *For the Health of the Nation: An Evangelical Call to Civic Responsibility*, NAT'L EVANGELICAL ASS'N, Oct. 8, 2004, at 1, available at http://www.nae.net/images/civic_responsibility2.pdf (last visited July 3, 2005) [hereinafter *For the Health of the Nation*].

104. The National Association of Evangelicals, *History of the NAE*, at <http://www.nae.net/index.cfm?fuseaction=nae.history>, (last visited July 3, 2005).

105. See *Defining Evangelicals*, *supra* note 86:

[I]t must be made clear that there is no monolithic consensus among evangelicals on politics. . . . While the movement is conservative in many regards, there are many evangelicals who would identify their political orientation as liberal. . . . [However,] [t]oday the overall political tenor of the movement could be described as moderately conservative and predominantly Republican.

106. See *For the Health of the Nation*, *supra* note 103.

107. *Id.*

108. Press Release, The National Evangelical Association, Evangelical Leaders Adopt Landmark Document Urging Greater Civic Engagement, (Oct. 8, 2004), available at <http://www.nae.net/index.cfm?fuseaction=editor.list&IDCategory=5> (last visited July 3, 2005).

109. *Id.*

and the role that God plays in civic engagement and the Bush presidency.

B. The Evangelical Treatise on Civic Responsibility

The treatise on civic engagement serves to frame the way in which evangelicals view political activity, including the seemingly secular speeches made by President Bush. In its "Preamble," the treatise states that evangelicals make up twenty-five percent of all voters and must continue to seize upon the historic opportunity to influence the current political climate with their vote.¹¹⁰ This opportunity, however, is presented as an obligation to God and a challenge to the very fabric of evangelicalism:

Never before has God given American evangelicals such an awesome opportunity to shape public policy in ways that could contribute to the well-being of the entire world. . . . We must seek God's face for biblical faithfulness and abundant wisdom to rise to this unique challenge. [While] [t]he presence and role of religion in public life is attacked more fiercely now than ever, making . . . bias of aggressive secularism the last acceptable prejudice in America[,] . . . [s]ome key American political leaders now conceive of their roles in moral terms. And they see themselves as stewards of the blessings of representative democracy, religious freedom, and human rights in a world where many nations are endangered by the forces of authoritarianism or radical secularism.¹¹¹

The treatise goes on to establish the basis for Christian civic engagement by identifying biblical passages that serve to support the responsibilities that evangelicals have in modern-day society.¹¹²

The primary reasons for civic engagement stem from the fact that "God created our first parents in his image and gave them dominion over the earth (Genesis 1:27-28) . . . [and] [t]he responsibilities that emerge from that mandate are many."¹¹³ While there is an affirmative obligation on the part of evangelists to become political participants, such involvement is also framed as a way in which to prevent evil from infiltrating the political process.¹¹⁴ To limit evangelistic influences to the private and domestic spheres is viewed as an abandonment of important Christian principles:

[B]ecause Jesus is Lord over every area of life[,] . . . [t]o restrict our stewardship to the private sphere would be to deny an important part

110. See *For the Health of the Nation*, *supra* note 103.

111. *Id.*

112. See generally *For the Health of the Nation*, *supra* note 103.

113. *Id.* at 2.

114. *Id.*

of his dominion and to functionally abandon it to the Evil One. To restrict our political concerns to matters that touch only on the private and the domestic spheres is to deny the all-encompassing Lordship of Jesus (Revelations 19:16).¹¹⁵

The treatise then incorporates additional evangelical doctrines in its effort to persuade adherents to participate politically, and there is a specific emphasis on conversion.¹¹⁶ The section devoted to the rationale for civic participation concludes with, "[W]e Christians bring a unique vision to our participation in the political order and a conviction that changed people and transformed communities are possible. . . . [We] can show those who are not believers how the Christian vision can contribute . . . and help alleviate the ills of society."¹¹⁷ The remainder of the treatise is devoted to identifying the variety of issues that are of particular importance to Christian evangelicals.

Throughout the document, however, is the articulation of a tension between serving God with humility and serving as watchdogs in order to restrain human evil and promote the common good.¹¹⁸ A major philosophical underpinning of the evangelistic approach to political activity is that government authorities are agents of God's justice and his laws.¹¹⁹ In addition, evangelicals believe that churches—not government—are the entities best equipped for guaranteeing wholesome families and the public order.¹²⁰ This disdain for government interference, and the steadfast belief that God extends beyond the reach of the government's authority,¹²¹ is reflected in many of President Bush's policy speeches and suggests that he is directing much of his rhetoric to a particular constituency—conservative evangelicals.

V. Presidential Speech and the Legal Restrictions that Should Be Placed On It

The Supreme Court has been compelled to review a wide variety of cases involving the Establishment Clause because it is such a controversial and murky area of the law. Based on the current Establishment Clause jurisprudence, President Bush's invocation of God to support policy decisions has offended the Establishment clause.

115. *Id.*

116. *Id.*

117. *Id.*

118. See generally *For the Health of the Nation*, *supra* note 103, at 2.

119. *Id.*

120. *Id.*

121. See Deborah Caldwell, *Did God Intervene? Evangelicals are Crediting God with Securing Re-Election Victory for George W. Bush*, at http://www.beliefnet.com/story/156/story_15602.html (last visited July 3, 2005).

A. The Endorsement Test and the Establishment Clause

In *Lemon v. Kurtzman*, the Supreme Court crafted a three-part test to evaluate the constitutionality of laws challenged under the Establishment Clause: (i) the statute in question must have a legitimate secular legislative purpose; (ii) its primary effect cannot advance or inhibit religion; (iii) and it must not create an excessive government entanglement with religion.¹²² Within this framework, the Court has identified various theories on the extent to which religion should be separate from the state.¹²³ A notable approach has been articulated by Justice Sandra Day O'Connor, whose vote often served as the deciding one in Establishment Clause cases that came before the Supreme Court during her tenure.¹²⁴

Justice O'Connor's approach, the endorsement test, serves to maintain government neutrality with respect to religion.¹²⁵ In *Lynch v. Donnelly*, Justice O'Connor sought to clarify the analysis that a court should use in applying the *Lemon* test in order to ensure neutrality.¹²⁶ Under her approach, the government violates the Establishment Clause where a practice is meant to symbolically endorse religion or where the practice conveys an endorsement of religion regardless of the government's actual intent.¹²⁷ She concluded that government neutrality protects the government from "mak[ing] a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"¹²⁸

In *Allegheny County v. Greater Pittsburgh ACLU*, Justice O'Connor went further to define the boundaries by which a governmental practice violated the Establishment Clause when she differentiated between a failure of the "endorsement test" and the longstanding religious invocations made at governmental ceremonies.¹²⁹ She concluded that

122. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

123. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1151 (2002).

124. See William H. Freivogel, *Supreme Court Case May Punch Hole in Church-State Wall*, ST. LOUIS POST-DISPATCH (Mo.), Mar. 28, 1994, at A4.

125. See *Lynch v. Donnelly*, 465 U.S. 668, 697 (1984) (O'Connor, J., concurring).

126. *Id.* at 687.

127. *Id.*

128. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (citations omitted).

129. See *id.* at 630-31:

It is the combination of the longstanding existence of such practices such as opening legislative sessions with legislative prayers or opening Court sessions with "God save the United States and this honorable Court," as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement

"the question under endorsement analysis . . . is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, [even where] they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time."¹³⁰ These religious invocations, however, are distinguishable from the religious-laden references that President Bush invokes to support policy positions. President Bush's speech is often not secular in nature, but rather contains religious references that resonate with many religious groups.¹³¹

1. President Bush and Religious Speech

Civil religion, as defined by the sociologist Robert N. Bellah,¹³² serves to describe a civil society guided by general religious precepts.¹³³ Academicians and prominent religious figures have argued that secularists overlook the fact that the presence of a civil religion in America has served to prod the nation's civic conscience and to act as a check on national hubris.¹³⁴ Many secularists and several religious thinkers, however, believe that President Bush has used a more potent and Protestant-based religious ideology to unleash such national hubris in light of the September 11th attacks and the war in Iraq.¹³⁵ Some religious references are more subtle than others, but all of them uniformly suggest that President Bush's relationship with God is one that he relies upon in order to arrive at particular policy decisions.

Despite the centrality of George W. Bush's religion in both his life and his presidency, he has made a conscious effort to reveal little about the extent to which religion influences his policies.¹³⁶ Most of his religious language reflects the important tenets of evangelicalism without expressly admitting that he adheres to that particular brand of Christianity. That stems, in part, from the fact that evangelicals perceive

of particular religious beliefs.

130. *Id.* at 631. (citations omitted).

131. See David Kirkpatrick, *Christian Conservatives Embrace Inauguration*, N.Y. TIMES, Jan. 20, 2005, at A12 ("The Rev. Rob Schenck, founder of the Washington-based Christian group Faith in Action, said his group has organized a morning prayer session for more than 150 out-of-town supporters to give thanks in large part for President Bush's 'public acknowledgment of God.'").

132. *Religion on the Stump*, L.A. TIMES, Oct. 9, 1999, at B9.

133. *Id.*

134. Jay Tolson, *The Faith of Our Fathers*, U.S. NEWS & WORLD REP., June 28, 2004, at 54.

135. See Ron Suskind, *Without a Doubt*, N.Y. TIMES, Oct. 17, 2004, § 6 (Magazine), at 44.

136. Alan Cooperman, *Openly Religious to a Point; Bush Leaves the Specifics of His Faith to Speculation*, WASH. POST, Sept. 16, 2004, at A01 [hereinafter *Openly Religious to a Point*].

that their way of life is under siege by an increasingly secular culture.¹³⁷ As Doug Wead, a campaign liaison to evangelicals for President George H.W. Bush, explained, evangelicals recognize that their beliefs are not widely popular and “they themselves have learned how to negotiate their language so as not to offend those who disagree with their views.”¹³⁸

Ultimately, Bush cloaks his religion in speeches just as other evangelists do.¹³⁹ The president and his chief speechwriter, Michael Gerson, who is a self-described evangelist,¹⁴⁰ work to craft language that religious insiders will understand¹⁴¹ and outsiders may not when referencing “hot-button” issues like abortion, stem-cell research or same-sex marriage.¹⁴²

President Bush’s opposition to stem-cell research prompted Sen. John Danforth, a former United States senator from Missouri and an Episcopal minister, to write several opinion pieces in the *New York Times* decrying the Republican party’s relationship with the religious right.¹⁴³ He noted that “[t]he problem is not with people or churches that are politically active. It is with a party that has gone so far in adopting a sectarian agenda that it has become the political extension of a religious movement.”¹⁴⁴ He further argued that the Republican agenda has become “secondary to the agenda of Christian conservatives.”¹⁴⁵ This pattern was particularly evident during the recent Terri Schiavo controversy,¹⁴⁶ where Bush often referred to the importance of the

137. Maura Reynolds, *Known for Discussing Faith, Bush Moderates His Message*, L.A. TIMES, Aug. 15, 2004, at A30. See also Hanna Rosin, *Right With God: Evangelical Conservatives Find a Spiritual Home on the Hill*, WASH. POST, Mar. 6, 2005, at D01 (“[Evangelical Washington staffers] may believe everything they believed before, but they’ve learned to speak in ways that are more measured and cautious and designed not to attract attention.”).

138. See Reynolds, *supra* note 137.

139. See Rosin, *supra* note 137.

140. Goodstein, *supra* note 13.

141. See Bumiller, *supra* note 17.

142. *Openly Religious to a Point*, *supra* note 136. See also Alan Cooperman, *Bush’s References to God Defended by Speechwriter; President Does Not Claim Divinity Is on His Side, Gerson Contends*, WASH. POST, Dec. 12, 2004, at A06. Gerson dismissed this contention in an off-the-record discussion with journalists:

Gerson acknowledged some rhetorical missteps . . . [b]ut on the whole, the speechwriter argued, Bush’s references to the role of providence in human affairs have been carefully calibrated and fully within the tradition of American civic religion.

Cooperman, *supra*.

143. See John C. Danforth, *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at A17; John C. Danforth, *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27.

144. *Id.*

145. *Id.*

146. See Manuel Roig-Franzia, *Long Legal Battle Over as Schiavo Dies; Florida Case Expected To Factor Into Laws for End-of-Life Rights*, WASH. POST, Apr. 1, 2005, at

"culture of life,"¹⁴⁷ a seemingly benign phrase that was originally coined by Pope John Paul II.¹⁴⁸ In addition to religious references made regarding domestic matters, there have been instances where President Bush's invocations of Christ and God are overt in the areas of foreign policy.¹⁴⁹

2. Bush's Foreign Policy Speeches and Their Religious Connotations

President Bush has framed the wars in Iraq and Afghanistan in classic religious terms. While he has shied away from publicly admitting that he is serving as a conduit for God,¹⁵⁰ there is evidence from a number of sources to suggest that he believes the wars he has waged against terrorism are an extension of a larger plan involving God's will.¹⁵¹

Evidence of George W. Bush's "faith-based presidency"¹⁵² first began to emerge immediately after the terrorist attacks on the World Trade Center and the Pentagon when he spoke before a joint-session of Congress and prayed for God's help.¹⁵³ That prayer was perceived as simple and nondenominational,¹⁵⁴ but he began to articulate statements that were harsher in tone and carried religious weight among evangelicals.¹⁵⁵ During a press conference on September 16, 2001, Bush spoke of the war on terrorism in terms of a crusade.¹⁵⁶ That press conference was followed by a meeting at the White House with religious leaders, where President Bush said that the devastation experienced in New York, Washington D.C., and in the outskirts of Pennsylvania prompted the nation to "look deep into its heart" and that the events of September 11th would serve as "part of a spiritual awakening in America."¹⁵⁷ Bush believes that he is an extension of this awakening and

A01.

147. See William Schneider, *The Strong and the Weak*, NAT'L J., Apr. 9, 2005.

148. *Id.*

149. See Suskind, *supra* note 135. See also *Religion & Ethics Newsweekly Interview*, *supra* note 99.

150. *A Library of Quotations on Religion and Politics by George W. Bush*, compiled by Beliefnet.com, Fall 2000, at http://www.beliefnet.com/story/33/story_3345_1.html (last visited July 3, 2005).

151. See Suskind, *supra* note 135.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* See also *Openly Religious to a Point*, *supra* note 136 ("This is a new kind of—a new kind of evil, and we understand. And the American people are beginning to understand. This crusade, this war on terrorism is going to take a while.").

157. See Tony Carnes, *Bush's Defining Moment*, CHRISTIANITYTODAY.COM, Nov. 12,

has an obligation to the country to serve as a national spiritual leader.¹⁵⁸ When one of the attendees of the White House meeting read aloud from *Romans 13* and said, "You not only have a civil calling, but a divine calling. . . . You are not just a civil servant; you are a servant of God called for such a time like this," Bush replied with, "I accept the responsibility."¹⁵⁹

Although his juxtaposition of America with "evil-doers" when referring to Al-Qaeda had deep religious undertones, Bush spoke more clearly of God's will when he began to publicly discuss the war in Iraq. Bob Woodward, in his book dealing with the events leading up to the Iraqi war, quotes President Bush as saying that he did not pray to "justify the war based on God," but did pray that he "would be as good a messenger of His will as possible."¹⁶⁰ He went further in a press conference in March 2004, where some listeners could have easily equated his politics in Iraq with God's will:

I also have this belief, strong belief, that freedom is not this country's gift to the world; freedom is the Almighty's gift to every man and woman in this world. And as the greatest power on the face of the Earth, we have an obligation to help the spread of freedom.¹⁶¹

Bush had made an earlier reference to the notion that people born in freedom are born in the image of God while speaking at the National Religious Broadcasters convention in February 2003.¹⁶²

The foreign policy goals that President Bush and his staff have articulated reflect some of the most important philosophical goals of the evangelist movement, notable among them is the belief that the Bible is the true word of God, and thus it serves as the mechanism for defining good and evil.¹⁶³ In President Bush's State of the Union address in 2003, and in the National Religious Broadcasters convention speech, Bush outlined his key foreign policy initiatives and used religious terms to justify them.¹⁶⁴ In his 2003 State of the Union address, he articulated the importance of America's responsibility to the world and added, "We must also remember our calling as a blessed country to make this world

2001, at <http://www.christianitytoday.com/ct/2001/014/1.38.html> (last visited July 3, 2005).

158. *Id.*

159. *Id.*

160. See WOODWARD, *supra* note 17, at 379. See also Evan Thomas, 'I Haven't Suffered Any Doubt,' *NEWSWEEK*, Apr. 26, 2004, at 22.

161. *George W. Bush Delivers Remarks at the National Training Conference on Human Trafficking*, FED. NEWS SERVICE, July 16, 2004.

162. See Tony Carnes, *The Bush Doctrine*, CHRISTIANITYTODAY.COM, Apr. 25, 2003, at <http://www.christianitytoday.com/ct/2003/005/3.38.html> (last visited July 3, 2005).

163. *Id.*

164. *Id.*

better . . . [and we are being led] into the world to help the afflicted, and defend the peace and confound the designs of evil men."¹⁶⁵ While these phrases would be permissible in a private context, these theologically and morally laden phrases are problematic in a presidential one. The problems stem not simply from the fact that America, since before its founding, has been a religiously pluralistic society, but also from the fact that the presidency has emerged as a unique office whose occupant serves as the leader of the country in both constitutional and symbolic terms. The Supreme Court has distinguished the president in a number of important ways¹⁶⁶ and, in so doing, has created a figure-head whose words and deeds carry enormous political and cultural weight. When President Bush speaks in religious terms as the president, he creates an endorsement of religious exercise in his capacity as the occupant of the executive office.

B. Defamation Law and the Unique Status of the President in the Constitution

Shortly after President George Washington issued the Neutrality Proclamation which established that the United States would remain impartial toward those countries involved in a war that erupted between Britain and France in 1793, a debate emerged between Alexander Hamilton and James Madison over the scope of inherent presidential power specified in the Constitution.¹⁶⁷ Did Washington have the necessary Constitutional authority to issue the proclamation? Hamilton argued that the president had broad inherent authority, including powers not expressly enumerated in Article II of the Constitution, while Madison believed that the language in Article II was "simply to settle the question whether the executive branch should be plural or single and to give the executive a title."¹⁶⁸ This debate has continued over the course of a number of Supreme Court decisions.¹⁶⁹ Regardless, the president is considered a unique figure in the American political landscape.

165. *Id.*

166. See CHERMERINKSY, *supra* note 123.

167. *Id.* at 330 n.4.

168. JAMES MADISON, *First Letter of Helvidius*, reprinted in ERWIN CHERMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 330 (2002).

169. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (delineating four models of presidential authority when a question arises as to whether a president may act without express constitutional or statutory authority) [hereinafter *Steel Seizure Case*]; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (upholding the delegation to the president to stop munitions shipments because the president has broad inherent authority in the foreign policy arena); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that while the president may have inherent power to order the seizure of ships, Congress, in passing the Nonintercourse Act, had limited the president's inherent authority).

1. The Distinctions Between the President and the Citizen

The Supreme Court has recognized that the office of the president accords the individual who occupies it particular rights and accommodations.¹⁷⁰ Specific examples of the range of privileges the president is afforded include possessing broad authority to craft foreign policy and negotiate executive agreements unilaterally,¹⁷¹ asserting executive privilege,¹⁷² and having the power to pardon.¹⁷³ In one¹⁷⁴ of several cases where the Supreme Court identified the president's official duties as separate and distinct from his private affairs, the Court recognized that the president is one who "occupies a unique position in the constitutional scheme"¹⁷⁵ and given his unique status, it "distinguishes him from other executive officials."¹⁷⁶ The Court has consistently recognized that the president serves as a spokesman for the state¹⁷⁷ and as such, is accorded specific rights and privileges in order to carry out the significant policy responsibilities with which he is entrusted.¹⁷⁸ Because of the nature of the president's job and the role he plays relative to his constituents, it is only fitting that just as his official duties are considered separate from his private acts, so too should his speech be delineated accordingly. When the president speaks in his official capacity as chief executive, he is effectively the spokesman of the state. His speech, while serving in his official capacity as chief policymaker, should be subject to different restrictions than those that apply to an average citizen.

2. The Distinctions Between Official and Non-Official Speech

The Supreme Court has recognized a variety of categories in order to identify the appropriate analysis a court should undergo when determining whether a plaintiff can recover under a theory of defamation.¹⁷⁹ Those categories seek to demarcate the plaintiff's

170. See CHEMERINKSY, *supra* note 123, 329-66.

171. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

172. See *United States v. Nixon*, 418 U.S. 683 (1974).

173. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

174. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that the president has absolute immunity from civil suits predicated upon his official acts).

175. *Id.* at 749-50.

176. *Id.* at 750.

177. See U.S. CONST. art. II, § 3 ("[The] executive Power shall be vested in a President of the United States. . ."). See also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Myers v. United States*, 272 U.S. 52, 134-135 (1926).

178. *Nixon*, 457 U.S. 731, 750 (1982).

179. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that where a

position relative to the community in which he or she has been allegedly defamed¹⁸⁰ and the motives behind the defamatory statement that was allegedly made.¹⁸¹ In the seminal case *New York Times v. Sullivan*, the Supreme Court ruled that in order to prevail under defamation, the plaintiff has to be a public figure. In addition, the *New York Times* Court held that the burden is on the plaintiff to demonstrate the falsity of the statements and provide proof of "actual malice," meaning that the defendant either knew that the statement was false or acted with reckless disregard for the truth.¹⁸² The Court has ruled on a number of cases to clarify these requirements,¹⁸³ and it has, in turn, ruled on the privileges available to certain classes of persons in order to protect them from liability in a defamation context.¹⁸⁴ An absolute privilege in defamation is rooted in a tradition of sound public policy; a complete bar on prosecuting statements regardless of whether they were false or maliciously made exists when the interests of the public outweigh reputational interests. The most significant case on the privileges afforded to members of Congress through the "Speech and Debate" clause of the Constitution¹⁸⁵ is *Hutchinson v. Proxmire*.¹⁸⁶ The *Hutchinson* Court sought to demarcate the boundaries of a Congressional member's protected speech in an attempt to limit the privilege afforded by the "Speech and Debate" clause.¹⁸⁷ Regardless of where those boundaries happen to fall, notably, the Court recognized that the clause was not meant to be strictly interpreted. The Court declined to limit privileged speech to the Congressional floor and instead interpreted the clause to include those activities that would "protect the integrity of the legislative process"¹⁸⁸ including committee hearings held outside the Congressional Chambers and committee reports.¹⁸⁹ The Court reasoned that "[the founding fathers] wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected

plaintiff is a public official or running for public office, he must show that that defendant acted with actual malice to win his defamation claim).

180. See *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (clarifying that a "public official" is a person who has substantial responsibility in government affairs).

181. See *Sullivan*, 376 U.S. 254 (holding that the plaintiff has the burden of proving falsity and actual malice with convincing clarity).

182. *Id.*

183. See *St. Amant v. Thompson*, 501 U.S. 496 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

184. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

185. U.S. CONST. art. I, § 6 ("[F]or any Speech or Debate in either House, they shall not be questioned in any other Place.").

186. *Hutchinson*, 443 U.S. 111 (1979).

187. *Id.*

188. *Id.* at 124.

189. *Id.*

when done by other citizens. . . ."¹⁹⁰ This analysis supports the view that there is a distinction between speech made by a member of government in his official capacity and speech made by an ordinary citizen.¹⁹¹ This distinction is particularly prominent with regards to the president because he is so visible and he is vested with the power to act unilaterally. In occupying the White House, he serves as a representative of his country on the international stage and he acts as chief executive of the national community. If Members of Congress have the ability to express two types of speech, the role of the Executive suggests that those distinctions would be equally appropriate. The president's speech in his official capacity should be viewed differently than speech that he conducts for purely political purposes.

VI. Conclusion

President Bush recently said, "I don't see how you can be president at least from my perspective, how you can be president, without a relationship with the Lord."¹⁹² Virtually every American president would be inclined to agree with him;¹⁹³ where they would invariably differ is the extent to which that relationship should be a public one. After an individual takes the inaugural oath and assumes the presidency, his position in the country and throughout the world radically changes. He represents the country and its people; he no longer speaks for only himself.

The Supreme Court has identified a number of privileges that extend to the individual who occupies the presidency in an attempt to ensure that the president has the ability to fulfill the duties required of him by the Constitution.¹⁹⁴ There have, however, been few cases that explore the ways in which the president's privileges should be circumscribed.¹⁹⁵

A president is invariably a product of his environment and influences; religion can serve to shape and define a president's world view. Nevertheless, the founding fathers were committed to limiting the role of the national government in religious activities.¹⁹⁶ That

190. *Id.* at 127 (quoting *United States v. Brewster*, 408 U.S. 501, 517 (1972)).

191. *Id.*

192. James G. Lakely, *President Outlines Role of His Faith*, WASH. TIMES, Jan. 12, 2005, at A1.

193. See generally HUTCHESON, *supra* note 8.

194. See *Steel Seizure Case*, 343 U.S. 579; *Curtiss-Wright*, 299 U.S. 304; *Little*, 6 U.S. (2 Cranch) 170.

195. See *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that a suit against a president could proceed if it was based on conduct that allegedly occurred prior to his taking office). See also *Nixon*, 418 U.S. 683 (1974).

196. See generally CURRY, *supra* note 3.

commitment is reflected in the Supreme Court's Establishment Clause jurisprudence and its articulation of the "endorsement test."¹⁹⁷ Justice O'Connor, in particular, promoted the importance of neutrality in a number of concurring opinions.¹⁹⁸

When President Bush uses religious laden language to persuade the public about policy choices, he creates the perception that he is endorsing a particular religious view in his capacity as president.¹⁹⁹ This perception,²⁰⁰ because of the position he occupies and the power with which he is entrusted as the executive of the national government, effectively serves to create an establishment of religion.

Defamation law provides a framework in which to approach and analyze the president's speech in order to allow him to achieve the aims envisioned for the Executive branch. While the privilege articulated in *Hutchinson v. Proxmire*²⁰¹ seeks to extend the protections afforded to Congressional members and this Comment argues for a restriction on speech, the substance of the privilege does not inform this comment's analysis. The *Hutchinson* decision does, however, articulate a distinction between public and private speech for governmental officials²⁰² and this mode of analysis provides a way in which the president's speech could be divided in order to determine what speech serves as an illegal endorsement of religion and what speech is an acceptable private expression of religion. Because the president is a unique figure in the American political scheme, he has a particular obligation to articulate his official policy decisions in terms that do not suggest an endorsement of religion. Religion can serve to shape the individual who occupies the office, but it should not provide license to take particular action on behalf of the nation.

197. See *Allegheny County*, 492 U.S. 573, 637 (1989).

198. See *id.*; *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984).

199. See Bumiller, *supra* note 17:

[M]r. Gerson wrote Mr. Bush's 2003 State of the Union address, which included the phrase "there is power, wonder-working power, in the goodness and idealism and faith of the American people." Mr. Bush was promoting his initiative that makes it easier for religious groups to receive government money for social programs by alluding to the chorus of an old Christian gospel hymn, "there is power, power, wonder-working power in the blood of the lamb."

The language offends people like the Rev. Dr. C. Welton Gaddy, the president of the Interfaith Alliance, a liberal religious group in Washington. "Anybody who grew up in a Christian evangelical tradition would have latched on to it immediately," Mr. Gaddy said. . . . "He's pushing a piece of legislation in which he has been saying 'We're not funding faith, we're funding social services.' But he's advocating the passage of the legislation using the language of a very particular faith."

200. See *Allegheny County*, 492 U.S. at 637.

201. See *Hutchinson*, 443 U.S. 111 (1979).

202. *Id.*

